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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 575

L. L. CONSTANTIN & CO.,
Petitioner,

vs.

ARIZONA WESTERN INSURANCE COMPANY,
Respondent,

and

S. & C. TRADING CO., INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT ARIZONA WESTERN INSURANCE COMPANY IN OPPOSITION

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Opinion Below

The opinion of the Court of Appeals is reported at 247 F. 2d 388.

Counter-Statement of the Question Presented

Did not the court below correctly interpret a corporate charter in the light of New Jersey law when it held that a charter providing that a corporation is "bound to pay * * * out of net profits * * * a fixed yearly dividend," in a

stated sum, supersedes the discretion normally reserved for directors in the declaration of dividends, and instead makes a dividend out of net profits mandatory?

Counter-Statement

An amendment to the charter of petitioner (sometimes referred to as "Constantin" hereafter), a New Jersey corporation, which authorized the issuance of its preferred stock, provided:

> "The holders of the preferred stock shall be entitled to receive, and the company shall be bound to pay thereon, but only out of net profits of the company, a fixed yearly dividend of Fifty Cents (50¢) per share, payable semi-annually." (Pet. 16)*

Respondent ("Arizona" hereafter) held 10,000 shares of Constantin's preferred, the stock certificate for which also contained this provision, during the entire year of 1955 (Pet. 11). Constantin, however, did not declare or pay a dividend for 1955 (Pet. 11, 13), although, as it conceded in argument in the Court of Appeals after earlier evasiveness on the point (Pet. 18), net profits were available (id.).

On cross-motions for summary judgment on the issue of Constantin's liability for the dividend to Arizona, the District Court ruled in Constantin's favor, the judge expressing the view that notwithstanding the charter provision, a dividend should be payable only in the directors' discretion (Pet. 13). The Court of Appeals reversed, holding the dividend mandatory. This determination, it is submitted, is plainly correct, and it presents no question warranting further review.

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* Citations herein to the petition for certiorari will refer to "Pet." followed by the page number.

Argument

The Court of Appeals, in the light of local statutes and cases, which it punctiliously examined, passed on a question involving the construction of a provision of a certificate of incorporation and stock certificate, instruments contractual in character. Its conclusion was in accordance with the local law. The provision on which it ruled is encountered only rarely in the corporate field, and its decision involves no question of general importance.

1. A reference to the narrow compass of the ruling below will demonstrate that the Court of Appeals correctly applied the law of New Jersey to the problem before it. Cases often arise where a stockholder sues for a dividend which the board is empowered but not required to declare. In such instances the courts hold that a dividend declaration is not compellable unless fraud, bad faith or abuse of discretion is shown. The present case deals with the infrequent situation where the corporation has contractually undertaken to pay dividends if profits are available, as they here were (Pet. 18).

In concluding that this undertaking, whose binding character "(w)ords could not more clearly or plainly manifest" (Pet. 16), overrides directorial discretion and must be honored, the Court of Appeals noted that the New Jersey statute, N.J.S.A. 14:8-1, permits the creation of stock with such "designations, preferences * * * or other special rights" as the charter may express (Pet. 17, n. 10; Pet. 9); that N.J.S.A. 14:8-2 provides that preferred stockholders are entitled to "dividends at such rates, on such terms, and at such times" as the charter may provide (Pet. 17, n. 10); and that N.J.S.A. 14:8-20 authorizes directors to determine dividends in their discretion "unless otherwise provided in the certificate of incorporation * * * ", a qualification

which led the court to the obvious conclusion that such discretion "may be legally contracted away under the law of New Jersey" (Pet. 17, 9).

Mindful of *Erie* v. *Tompkins*, 304 U. S. 64 (1938), and its progeny (Pet. 14, 16), the court scrutinized the New Jersey cases which bore on the subject (id.): *Park* v. *Grant Locomotive Works*, 40 N. J. Eq. 114, 117-18, 3 Atl. 162, 165 (Chancery, 1885), aff'd, 45 N. J. Eq. 244, 19 Atl. 621 (E. & A., 1888); *Fougeray* v. *Cord*, 50 N. J. Eq. 185, 24 Atl. 499 (Chancery, 1892), reversed on other grounds *sub nom. Laurel Springs Land Co.* v. *Fougeray*, 50 N. J. Eq. 756, 26 Atl. 886 (E. & A., 1893); *Stevens* v. *United States Steel Corp.*, 68 N. J. Eq. 373, 377-78, 59 Atl. 905, 907 (Chancery, 1905); and *Wilson* v. *American Ice Co.*, 206 Fed. 736, 738 (D. C. N. J., 1913). The cases, or the language in them, while admittedly not too helpful (Pet. 14), indicated generally, in consonance with other authorities (Pet. 17, nn. 12, 13), that directors' discretion could be limited by appropriate charter provisions.

Constantin, in its petition, has cited to the Court, as it did to the court below, a number of decisions where, in the absence of bad faith factors, directors' refusals to declare dividends were judicially sustained. This is of course the rule where governing instruments confer discretion, either expressly or impliedly, as they did in virtually all the cases on which the petitioner relies (Pet. 5 ff.).* In no case

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*As examples there may be mentioned *Agnew* v. *American Ice Co.*, 2 N. J. 291, 66 A. 2d 330, 332 (1939) (Pet. 5), where preferred dividends were payable "as and when declared by the Board of Directors * * *"; and *Field* v. *Lamson & Goodnow Mfg. Co.*, 162 Mass. 388, 38 N. E. 1126, 1127 (1894) (Pet. 8), where the priority of the preferred dividend over the common dividend was mandatory under the charter, but not the preferred dividend

(Continued on following page)

cited by it, however, was there a mandatory provision comparable in any way to the petitioner's own charter.

The conclusion below "that the Supreme Court of New Jersey, did that tribunal have the instant case before it, would hold that the payment of a dividend for the year 1955 was required of Constantin if there were net profits available" (Pet. 17) was eminently proper. The competence of Courts of Appeals on the law of states within their jurisdictions is well recognized, and the policy of this Court is to leave their rulings in this sphere undisturbed. *Estate of Spiegel* v. *C.I.R.*, 335 U. S. 701, 707-708 (1949); *General Box Co.* v. *United States*, 351 U. S. 159, 165 (1956).

2. The relevance to petitioner's contention of *New York, Lake Erie & Western R.R. Co.* v. *Nickals*, 119 U. S. 296 (1886), cited by it (Pet. 7), is not evident. Of pre-*Erie Tompkins* vintage, the case does not involve New Jersey law. There was no charter restriction on management's discretion; on the contrary, the preliminary agreement for organization made dividends payable "as declared by the board of directors" (119 U. S. at 305). The Court recog-

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(*Continued from preceding page*)

itself. In some cases cited by the petitioner, like *In re Evening Journal Assn., Inc.*, 15 N. J. Super. 58, 83 A. 2d 138 (1951) (Pet. 5, 7), the charter provision was of such slight consequence to the issue that it was not mentioned in the opinion. 6 A. L. R. 809 (Pet. 8) cites some old cases where unconditional preferred dividend provisions were judicially rejected or modified, unlike the situation here where the dividends are payable only if there are profits. The conclusion in the note in 39 Ill. L. Rev. 90 (1944) (Pet. 8) that the upholding of the mandatory character of a contractual dividend provision is not approved by a majority of the courts is the result of a failure to inquire into the precise terms of the charter provisions referred to. Analysis shows, on the contrary, that such provisions are followed unanimously. See cases cited Pet. 17, n. 13, and cf. 12 Fletcher Cyc. Corp. §5447.1 (1957 rev.).

nized, furthermore, that the directors' "authority in respect of these matters (referring to dividend declarations) may, of course, be controlled or modified by the company's charter * * * " (at 304), precisely as did the Court of Appeals here.

3. No public interest is affected by the ruling sought to be reviewed. Since, as has been noted, a provision for mandatory dividends out of profits is unusual, the dolorous future consequences to corporate management, to the healthy growth of industry, and to the protection of stockholders' investments attributed to the decision below (Pet. 6-7) are not likely to arise. Nor is the petitioner itself, with net profits at the end of 1955 of over $800,000 (Pet. 18) against an annual dividend requirement of not over $25,000 (Pet. 11 and n. 1) likely to undergo such consequences.

Contrary to the petitioner's assertions (Pet. 8), the ruling below does not confer upon a stockholder the status of a creditor, nor is the equity of the petitioner transformed into debt, for the charter does not undertake to pay dividends in the absence of profits, while debts to creditors must be paid, profits or no.

4. The certiorari procedure was designed to eliminate rather than encourage litigation in this Court concerning the construction of a private instrument. No more than this is here involved. Robertson & Kirkham, *Jurisdiction of the United States Supreme Court* (Wolfson and Kurland ed., 1951), §333, text at n. 1, p. 657; and see Frankfurter and Hart, *The Business of the United States Supreme Court at October Term, 1933*, 48 Harvard L. R. 238, 269 (1934); Mason, *Harlan Fiske Stone: Pillar of the Law* (1956), p. 448.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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